No. 11,023

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

PATRICK LUMBER COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT.

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JURISDICTION.

This is an appeal by the Price Administrator from a judgment of the United States District Court for the District of Oregon in an action by the Price Administrator under the Emergency Price Control Act of 1942 (56 Stat. 23) as amended by the Stabilization Extension Act of 1944 (58 Stat. 636) seeking damages under Section 205(e) as amended (50 U.S.C.A. Sec. 925(e)). The judgment dismissing the action was entered December 18, 1944 (R. 10). Notice of appeal was filed February 24, 1945 (R. 11).

Jurisdiction of the District Court was invoked under Section 205(c) of the Act (50 U.S.C.A. Sec. 925(c)) as indicated in the complaint (R. 2) and

jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U.S.C. Sec. 225).

STATUTES AND REGULATIONS INVOLVED.

The action involves the Emergency Price Control Act of 1942 and Revised Maximum Price Regulation No. 26 ("Douglas Fir and Other West Coast Lumber") issued thereunder (8 F.R. 7570).

1. The Statute.

Pertinent provisions of the Emergency Price Control Act as amended are as follows:

> "Sec. 4(a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing."
>
> * * * * * * *
>
> "Sec. 204(d). * * * Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act au-

thorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

* * * * * * *

"Sec. 205(e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.*[1] For the

[1]As amended by Section 108(b) of Stabilization Extension Act of 1944, 58 Stat. 636. Formerly read, in place of italicized language:

"* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the Court."

purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price.*[2] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.*[3] [*The amend-*

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[2]Added by Section 108(b) of Stabilization Extension Act of 1944.

[3]As amended by Section 108(b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

ment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]"[4]

2. The Regulation (RMPR 26, 8 F.R. 7570).

"Sec. 1. *Prices higher than ceiling prohibited.* (a) On and after June 9, 1943, regardless of any contract or other obligation, no person shall sell or deliver, and no person shall buy or receive in the course of business, any Douglas fir or other West Coast Lumber for direct-mill shipment at prices higher than the maximum prices fixed by this regulation, and no person shall agree, offer, or attempt to do any of these things.

"Sec. 2. *What products are covered.* (a) This regulation covers all Douglas fir (Pseudotsuga taxifolia), West Coast hemlock (Tsuga heterophylla and Tsuga mertensiana) and all species of true fir (abies) lumber produced in those parts of Oregon, Washington, and Canada lying west of the crest of the Cascade Mountains, and in California and Alaska. Any such lumber produced in these areas is covered, regardless of the kind of mill or plant in which it is produced.

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[4]Matter in brackets added by Section 108(c) of Stabilization Extension Act of 1944. The reference to "subsection (b)" is to Section 108(b) of that Act.

"The regulation applies whether the particular item is specifically priced in the price tables or not (except switch ties and cross ties, which are covered in Maximum Price Regulation 284—Western Primary Forest Products)."

* * * * * * *

"Sec. 3. *What transactions are covered*—(a) *Direct-mill shipments.* This ceiling applies to all shipments originating at a mill, no matter who the seller is, and no matter whether he usually is known as a mill, wholesaler, retailer or anything else. It does not apply to sales out of distribution yard stock. (The prices for yard sales may be found either in Maximum Price Regulation No. 215 or in the General Maximum Price Regulation, depending on the nature of the sale and the purchaser.) A shipment is regarded as originating at a mill if the lumber reaches the purchaser without ever becoming an integral part of the stock of a distribution yard. * * *

* * * * * * *

"Sec. 4. *What persons are covered.* Any person who makes the kind of sale or purchase described above, for himself or others, is subject to this regulation. The term 'person' includes an individual, corporation, partnership, association or any other organized group, their legal successors and representatives, the United States or any government or any of their political subdivisions or any agency of any of the foregoing.

* * * * * * *

"Sec. 5. *Basic prices and cash discount*—(a) *Basic prices.* The maximum prices f.o.b. mill are set forth in Article V—Price Tables.

* * * * * * *

Sec. 12. *Grades, services, or extras not listed.* (a) If a seller wishes to sell a grade which is not specifically priced in the price tables, or wishes to make an addition for special workings, specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington, D.C., for a maximum price. He must provide the following information:

(1) The requested price;

(2) A complete description of the item to be priced;

(3) The price differential between it and the most comparable item in the price tables, between October 1, 1941 and June 1, 1942, from the seller's own records, or if that is impossible, from the experience of the trade. If no established price differential existed, a detailed analysis of comparative value should be furnished.

(b) As soon as the request has been filed, quotations and deliveries may be made at the requested price, but the final payment may not be made until the price has been approved. Action on the request may be by letter or telegram.

(c) In all cases where special prices have been approved by the Lumber Branch of the Office of Price Administration under sec. 1381.62, paragraph (g) of the earlier regulation Maximum Price Regulation 26, these special prices shall no longer apply if specific prices for the items are established by this regulation; but if no specific prices are established in the price tables, the price approved under the earlier regulation shall continue in effect.

* * * * * * *

"Sec. 22. *Grades.* All grade and size terms and 'paragraph' references appearing in this regulation refer to, and have the meaning given in, the Standard Grading and Dressing Rules No. 12, issued by the West Coast Lumbermen's Association, effective March 1, 1943, or, in the case of export sales from the 'N' list, to the 'N' Export Grading Rules adopted by the West Coast Lumbermen's Association and British Columbia Lumber and Shingle Manufacturers, Ltd., 1929.

Article V—Price Tables

"Sec. 23. *Douglas fir.* The maximum prices for Douglas fir lumber f.o.b. mill per one thousand feet board measure (or other designated measure where so indicated) where shipment originates at a mill, shall be as follows:

CONSTRUCTION GRADES

Table I—Boards and Shiplap

* * * * * * *

Table 2—Dimension

No. 1, Green, Rough or S4S, A.L.S.

Regular Loading	6′ to 20′	6′	8′	9′	10′	12′	14′	16′	18′	20′	22′ to 24′	Ad dr
2 x 2″	$31.50	$24.00	$30.00	$33.50	$32.00	$32.00	$32.00	$34.50	$34.50	$34.50	$38.00	$
2 x 3″	28.50	21.00	27.00	30.50	29.00	29.00	29.00	31.50	31.50	31.50	35.00	
2 x 4″	28.50	21.00	28.50	29.00	28.00	28.50	28.50	29.50	29.50	29.50	32.00	
2 x 6″	28.50	21.00	26.50	28.50	27.00	28.50	28.50	29.00	29.00	29.00	31.00	
2 x 8″	27.50	20.00	26.00	27.00	26.00	27.50	27.50	27.50	27.50	27.50	29.50	
2 x 10″	27.50	20.00	26.00	28.00	26.50	28.00	28.00	28.50	28.50	28.50	30.50	
2 x 12″	27.50	20.00	26.00	28.00	27.00	28.00	28.00	28.50	28.50	28.50	30.50	

Grades

1. Scaffold Plank, paragraph 289, add $20.00 per M to the select structural price.

2. Select Merchantable add to the price of No. 1 same width and length—$3.00.

3. Select Structural add to the price of No. 1 same width and length—$5.00.

4. No. 2 green all widths and lengths 24′ and shorter deduct $2.00 per M from the No. 1 green of the same width and length.

5. No. 3 green 2 x 2″ to 2 x 8″, 24′ and shorter deduct $8.00 per M from the No. 1 green of the same width and length.

6. No. 3 green 2 x 10″ and 2 x 12″, 24′ and shorter deduct $9.00 per M from the No. 1 green of the same width and length.

7. No. 2 dry all widths and lengths 24′ and shorter deduct $4.00 per M from the No. 1 dry of the same width and length.

8. No. 3 dry 2 x 2 to 2 x 8, 24′ and shorter deduct $10.00 per M from the No. 1 dry of the same width and length.

9. No. 3 dry 2 x 10 and 2 x 12, 24′ and shorter deduct $11.00 per M from the No. 1 price of the same width and length.

10. No. 1 permitting up to 15% of No. 2 deduct $0.50 per M from the No. 1 price of the same width and length.

11. No. 4 rough or surfaced. Dry or Green, 2xaw, a1 $12.50. Dry or Green use green weights.

12. Paragraph 215, 1200 F (Bending stress) add $2.00 per M to the No. 1 price of the same size.

13. Paragraph 216.900 F (Bending stress) add $1.00 per M to the No. 2 price of the same size.

Lengths

14. Omitting short length in R/L loading add to the R/L price of the same size and grade:

6′ and 8′ and/or 10′.....$0.50
12′ and shorter..... 1.00
14′ and shorter at specified length price.

15. Odd or fractional length add $1.00 to and compute footage on next longer even length.

16. For even lengths longer than 24′ add $2.00 per M for each two feet longer than 24′ of the same size and grade.

Widths

17. Wider than 12″ add $1.00 for each 2″ wider than 12″ for the same size and grade.

18. Odd or fractional widths add $1.00 to and compute footage on next wider even width except 2 x 3.

Thicknesses

19. Fractional thicknesses over 2″ and under 3″ price from the table for plank and small timbers by adding $3.00 per M to the 3″ price of the same length, width and grade. Compute footage on actual rough measure.

Working charges

20. Surfaced ¼″ off add $1.00 per M to the same length, width and grade.

21. Ripping or resawing, not diagonal or tapered; for 2 x 4″ add $2.00 per M; 2 x 6″ and wider add $1.00 per M. Diagonal or tapered resawing add $5.00 per M. In either instance, the product of the strip to be shipped.

22. Center matched, flooring, outgauged and other patterns. The following working charges contemplate first adding grade differentials and then the specified working charge.

	Green		Dry	
	S2S and CM or S/L	Flooring, outgauged or other patterns	S2S and CM or S/L	Flooring, outgauged or other patterns
2″ thickness, no droppings allowed	$1.00	$2.00	$1.50	$2.50
2″ thickness droppings included at no reduction in price	.50	1.00	.50	1.00

23. For S1S, S1E, S2S, S2E, S1S1E, S2S1E or S1S2E A.L.S. add $1.00 per M BM. Addition limited to orders specifying one grade only.[5]

Miscellaneous

24. Rough dry add $1.00 per M to the S4S dry price."

STATEMENT OF THE CASE.

This suit for treble damages arises out of the sale of three cars of lumber by defendant Patrick Lumber Company to the John Schroeder Lumber and Supply Company. Defendant-appellee is a wholesaler who bought the lumber from the mill (West Side Lumber Co.) and resold to his customer without physically handling the lumber—i.e., it was a "direct-mill shipment". The three invoices (Exhibits 3-5, R. 64-66)

[5]As amended by Amendment 2, effective August 24, 1943 (8 F.R. 11508). Formerly read: For S1E, S2E, S1S, S2S or S1S1E ALS, add $1.00 per M.

were dated September 3, 1943, September 16, 1943, and October 7, 1943. Revised Maximum Price Regulation 26 (8 F.R. 7570), hereinafter referred to as "the Regulation", became effective June 9, 1943 (superseding Maximum Price Regulation 26, 7 F.R. 4573, which had been in effect since June 29, 1942). Defendant-appellee claims that he properly determined the ceiling price applicable to these sales by reference to Table 2 of the Regulation rather than by special application to the Office of Price Administration (R. 100, 104). The Price Administrator claims that since the lumber was surfaced one side to 1½"—a specification which is not specifically priced in Table 2, then Section 12 of the Regulation came into play, under which, application would have to be made to the Office of Price Administration for approval of a price.

When the Administrator discovered that defendant-appellee had failed to apply for a price applicable to these transactions, the mill involved (whose ceiling price is the same as the wholesaler's—see Sec. 3 of the Regulation) was requested to file such an application. Acting on this application (R. 128) for approval of the prices which had been charged by the mill and defendant wholesaler in the allegedly violative transactions, the Office of Price Administration established prices lower than those requested (R. 131). The difference between the prices thus established and the prices actually charged is the overcharge forming the basis of this action.

The action was tried before the Court without a jury, and Judge McCulloch concluded that defendant-

appellee did not violate the Act or the Regulation, hence the action should be dismissed (R. 9).

The sole issue is one of interpretation of the Regulation. It was agreed in open Court that "the arithmetic of the overcharges as set forth in the complaint is stipulated as correct" (R. 71). In other words there is no issue here of whether, or to what extent, the prices actually charged by defendant-appellee are higher than the maximum prices approved by the Office of Price Administration pursuant to the mill's application under Section 12. It is agreed that they are higher, and the amount of the difference is also agreed to. The issue is: which of the two parties has correctly construed the Regulation in arriving at the maximum prices contended for? Does Table 2 apply, as defendant-appellee contends, or does Section 12 apply, as the Administrator contends? And if Section 12 applies, is it a correct construction of that section to say that it contemplates application of the mill prices approved by the Administrator to wholesaler transactions already consummated?

The reason for Judge McCulloch's dismissal of the action was that he did "not feel convinced by a preponderance of the evidence that the interpretation of the regulations advanced by Mr. Jayne, and espoused by Mr. Bischoff, is the correct interpretation, as opposed to the interpretation acted upon by Patrick, Brushoff, Edwards and the mill. The failure to sustain the burden of proof on the major issue makes it unnecessary to decide other questions" (R. 7).

SPECIFICATIONS OF ERROR.

1. The Court below erred in finding that the prices charged by defendant-appellee for the lumber involved did not exceed the maximum prices prescribed in Revised Maximum Price Regulation 26.

2. The Court below erred in concluding that defendant-appellee "did not violate the Emergency Price Control Act of 1942 or any regulation, order, or price schedule thereunder".

3. The Court below erred in concluding that the suit should be dismissed.

ARGUMENT.

I. DEFENDANT-APPELLEE'S SALES OF THE LUMBER INVOLVED IN THIS SUIT WERE SUBJECT TO THE PROVISIONS OF SECTION 12 OF THE REGULATION RATHER THAN TO TABLE 2.

The "dimension" lumber involved in this suit is a construction type of Douglas fir which, according to the invoices (Exhibits 3-5, R. 64-66) was surfaced on one side (S1S), "hit and miss" (H & M) to a thickness of 1½". The two edges werealso surfaced (S2E); and the various grades included in the shipment were "select structural" (Sel Str), "select merchantable" (Sel Mer), "Paragraph 215" (Pa. 215), and "No. 2 Common" (#2 Com). The above symbols appearing on the invoices are given (Section 22 and Table 2, note 23 of the Regulation) the meanings set forth in Standard Grading and Dressing Rules No. 12, issued by the West Coast Lumbermen's Association effective March

1, 1943 (Exhibit 2), and the American Lumber Standards (Exhibit 1), and are explained in the testimony (R. 68-69).

The maximum prices in the text of Table 2 of the Regulation during the period of these violations (September 3-October 7, 1943) were applicable to "No. 1" common, green dimension lumber, *2"* thickness, either unsurfaced (*"rough"*) *or* surfaced four sides (S4S), with face widths from 2" to 12" and of various specified lengths; and additions or deductions were listed in the notes to the table, to cover variations from these standard listings. (See Text, supra, p. 8, and R. 78 ff). Note 23[6] provided: "For S1S, S2E, S2S, S1S1E, S2S1E, or *S1S2E A.L.S.* add $1 per M BM. Addition limited to orders specifying one grade only." (Emphasis supplied.)

Thus it is apparent that Table 2 did not cover the 1½" thickness lumber involved in the instant transactions. The text of the table (which applied only to No. 1, rough or S4S) was inapplicable, and the prices established in the notes for the various qualities here involved ("select structural", "select merchantable", etc.) and for the S1S2E surfacing involved (Note 23) were also inapplicable,—since *all* dimension lumber, of whatever quality or surfacing, has a standard, minimum thickness when surfaced at all, of *1*⅝" (American Lumber Standards, Exhibit 1, R. 61-62, 70-71; Grading Rules, Exhibit 2 (not printed in Record), p. 142; R. 70).

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[6]As amended by Amendment 2, effective August 24, 1943—8 F.R. 11508.

Under such circumstances, Section 12 of the Regulation becomes applicable. As stated in Section 2, "The regulation applies whether the particular item is specifically priced in the price Tables or not." Section 12 is the section designed to cover the pricing of all items of dimension lumber which are not specifically priced in the table. This section provides:

"Sec. 12. Grades, services, or extras not listed. (a) If a seller wishes to sell a grade which is not specifically priced in the price tables, or wishes to make an addition for special workings, specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington, D.C. for a maximum price. He must provide the following information.

(1) The requested price;

(2) A complete description of the item to be priced;

(3) The price differential between it and the most comparable item in the price tables, between October 1, 1941 and June 1, 1942, from the seller's own records, or if that is impossible, from the experience of the trade. If no established price differential existed, a detailed analysis of comparative value should be furnished.

(b) As soon as the request has been filed, quotations and deliveries may be made at the requested price, but the final payment may not be made until the price has been approved. Action on the request may be by letter or telegram."

An indication, at this point, of the history of this section may be helpful. An early version of the Regulation reads as follows (OPA Service, p. 39:290-H):

> "Sec. 1381.62(g)(2). No *addition* may be made for workings, *specifications,* services, or extras not expressly provided for in §1381.62: Provided, That the seller may apply to the Lumber Branch of the Office of Price Administration in Washington, D.C. for approval of additions for workings, specifications, services or other extras not provided for. In such application the seller shall describe in detail the workings, specifications, services or other extras not provided for together with a statement showing how the addition requested was determined and that the proposed addition was regularly made immediately prior to October 1, 1941, for the particular or similar working, specification, service or extra together with a certified copy of order or invoice of a representative sale on which such an addition or similar addition was made. Pending approval of such addition, the seller may quote and deliver at a price which is agreed by the parties to be subject to adjustment to the price approved by the Office of Price Administration, but the seller may not accept payment and the purchaser may not make payment until approval of such addition in writing has been received." (Emphasis added.)

This was construed as follows by the OPA (OPA Service, p. 39:5013):

> "*Unlisted grades.* The maximum prices for *grades* of lumber which are cheaper than any *item* listed in the price tables and which are not de-

> scribed in the W.C.L.A. grading rules, are established by sec. 1381.62(g)(2), of the Regulation. *The word 'additions' referred to in that Section should be interpreted as 'prices'*, since no addition is made but rather a price established which is not higher than the cheapest related grade. For instance, the cheapest related grade for 'E' flooring is No. 3, Common Boards and the maximum price approved by OPA for 'E' flooring will be no higher than that for No. 3 Common Boards."[7] (Emphasis added.)

Thus, the word "grade" is used interchangeably with "item"; and the word "additions" is to be construed as "prices". Later, the net result of this interpretation was specifically embodied in Amendment 9 (7 F.R. 8877), October 30, 1942.[8]

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[7]Cf. similar view expressed in Statement of Considerations for Amendment 6 to Section 1381.62(g)(1) (this section appears in the note at OPA service, p. 39:290-G), where provisions applicable to "grades and classes of lumber" and to "additions" were described as provisions "under which maximum prices are established for *any item* of Douglas fir or other West Coast lumber not specifically priced in the Regulation." (OPA Service, p. 39:304.)

[8]"For *prices* of workings, *specifications*, special *grades*, services, or extras *not otherwise provided for* in this section, the seller shall apply to the Lumber Branch of the Office of Price Administration in Washington, D.C. for an authorized price. In such application the seller shall * * *

"The Office of Price Administration shall within 30 days of the receipt of the application, either authorize the requested price or authorize a price which is deemed proper. Authorization may be by letter or telegram. If the Office of Price Administration does not within 30 days either authorize a price or require further justification of the requested price, the requested price shall be considered approved.

"Pending approval of such price, the seller may quote and deliver at a price which is agreed by the parties to be subject to adjustment to the price approved by the Office of Price Administration, but the seller may not accept payment and the buyer may

It so happens that in the general revision of the Regulation, the draftsman fell back on some of the original language, which existed prior to Amendment No. 9, so that Section 12 of Revised Maximum Price Regulation No. 26 reads, "If a seller wishes to sell a grade which is not specifically priced in the price tables, or wishes to make an addition for special workings, specifications * * * he must apply * * * (etc.)." *But this use of "grade" and "additions" had previously been clarified by interpretation.* As we have seen, "grade" was used interchangeably with "item"; and "addition" had the same effect as though the word "price" had been used.

Moreover, the record of the present case shows clearly that the "grades" listed in the Tables of the Grading Rules *have meaning only in relation to different sizes.* Size is one of the elements of the definitions (see R. 72-73, 87-88; Exhibit 2, Par. 193-197). Thus defendant-appellee himself recognized that "face-width" was one of the "elements of grade or quality" (R. 91), since quality may vary with size. Further, Section 12(c) provides for continuation of the special prices previously established (unless spe-

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not make final payment until a price has been authorized." (Emphasis added.)

The Statement of Considerations accompanying Amendment No. 9 (OPA Service 39:305) observes:

> "A change is made in the phrasing of subparagraph (2) of paragraph (g) in Section 1381.62. The change is to make it clear that all sales of Douglas fir and other West Coast lumber calling for grades, specifications, workings, or other extras not otherwise provided for, are covered by that subparagraph and may be priced under that subparagraph. This change is effected by substituting for the word 'additions', the word 'prices'."

cific prices are established by the new regulation) and again the units for which special prices are established are referred to broadly as "items".[9]

It cannot reasonably be argued that the change of language occurring in the revised regulation was intended to effectuate a departure from the previous rule. So important a departure would certainly have been mentioned in the Statement of Considerations for the revised regulation but nothing in the Statement shows any intent to make such a departure (see OPA Service, p. 39:310-A). As is the case in the construction of statutory amendments, changed language which on its face might betoken a change in intent will not be so construed where the background or history of the change negates a departure from original intent. See *United States v. Dickerson,* 310 U. S. 554, 60 S. Ct. 1034.[10]

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[9]Section 12(c):

"In all cases where special prices have been approved by the Lumber Branch of the Office of Price Administration under Section 1381.62, paragraph (g), of the earlier regulation Maximum Price Regulation No. 26, these special prices shall no longer apply if specific prices *for the items* are established by this regulation; but if no specific prices are established in the price tables, the price approved under the earlier regulation shall continue in effect." (Emphasis added.)

[10]This case involved the question of whether the right to certain re-enlistment allowances had been suspended. A re-enlistment allowance provided for by an Act of 1922 had been *specifically suspended* for four successive years by successive enactments; then there was a change in language so as merely to make certain *appropriations for that year* unavailable for the payment of the allowances, no suspension being made of the right given in the 1922 statute. In spite of the clearly restricted scope of the changed language, and the inference to be drawn from the very fact of change, the Court felt that the legislative history, showing that the changed language did not reflect a changed intent, was controlling.

Why, indeed, should such a departure from the original intent have been made? The basic structure of the Regulation, as we have shown, was the establishment of specific prices for specific items of dimension lumber; and for those not specifically priced, approval of a price was to be requested by application to the Office of Price Administration. What reason would there be for suddenly excluding from this basic plan the pricing of special sizes or specifications not specifically priced? In fact, the Administrator's experience has been that the overwhelming majority of applications for approval under the section have been precisely with respect to special sizes rather than special qualities or services. Obviously the intention of the Office of Price Administration is, and must sensibly be, to provide either a specific price or a means for the ultimate establishment of a specific price for *every* quality and size of dimension lumber sold. Since, then, the 1½" thickness was not specifically priced, every consideration of effective administration supports the view that Section 12, like the prototype in the earlier regulation, was intended to be applicable so that a price could ultimately be established by the Administrator.

A contrary construction would be untenable. It would mean either (1) the 1½" thickness was not covered at all by the regulation, or (2) it was covered by Table 2. In defendant-appellee's testimony he at one point seemed to suggest the first alternative. He said that the actual pricing of the lumber he had sold was designed to yield to the mill a compensation

equivalent to the price obtainable for the 3″ planks from which the dimension lumber had been sawed (R. 104-06). In other words, the theory seemed to be that the item was unpriced, and therefore sellers were free to adopt any pricing rule that made sense to them. The mere statement of such a proposition is enough to show the travesty of price-control which would result from its acceptance. Moreover, this first alternative construction is made completely untenable by the provision of Section 2 that the regulation covers "all Douglas fir" and "applies whether the particular item is specifically priced in the price tables or not".

At another point in his testimony, defendant-appellee indicated acceptance of the second alternative. He stated that after considerable consultation and difference of opinion (R. 103) this 1½″ substandard item was priced "on Table 2" (R. 104); apparently it was done by reference to the price for "normal 2-inch rough" (R. 100). But Table 2, as we have seen, applies in its text and notes to various qualities of dimension lumber of either 2″ thickness ("rough") or 1⅝″ thickness (surfaced one or more sides). *Nowhere is 1½″ thickness specifically priced.* Defendant-appellee seems to read the regulation as though Table 2 established a basic price for *all* dimension lumber subject to any deductions or additions permitted in the notes; so that where no additions or deductions were permitted for a particular special size, the seller was allegedly free to use the basic price in the text of the table. This of course ignores the specific language of the heading of Table 2, and assigns to Table 2 the

role of Section 12 as the catch-basin for miscellaneous qualities, sizes, etc., not specifically priced.

Thus, each of the conflicting alternative constructions which might underlie defendant-appellee's rejection of the applicability of Section 12, cannot withstand analysis.

It is a familiar principle in the law of construction of statutes that where unreasonable or illogical consequences at variance with the purposes of the statute or with other evidence of intent follow from a literal reading of the language, a literal reading will not be given. "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." (Holmes, J. in *Boston Sand and Gravel Co. v. United States,* 278 U.S. 41, 48.) See *United States v. Dickerson,* 310 U.S. 544, 562, 60 S. Ct. 1034; *United States v. American Trucking Association,* 310 U.S. 534, 543-44, 60 S. Ct. 1059; *Takao Ozawa v. United States,* 260 U.S. 178, 194, 43 S. Ct. 65; *United States v. Katz,* 271 U.S. 354, 357, 46 S. Ct. 513; *Securities & Exchange Commission v. Sunbeam Gold Mining Co.,* 95 F. (2d) 699 (C.C.A. 9th). The "duty of the courts", as this Court has said, "is to ascertain the legislative intent 'not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests

for the ascertainment of the legislative will' " (*Carter v. Liquid Carbonic Pacific Corp.,* 97 F. (2d) 1, 3 (C.C.A. 9th)). So, too, with the construction of written documents generally (9 *Wigmore,* Evidence (3rd Ed. 1940), Sec. 2461-2462).[11]

It is worth noting, parenthetically, that the Administrator's construction works no "hardship" on defendant-appellee. He had operated from the inception of the original M.P.R. No. 26 under the same rule for pricing special sizes as the Administrator contends is applicable now; if the changed language of the revised regulation raised any doubts in his mind, *he would readily have dispelled them by inquiring of the OPA.* In this respect, uncertainty as to the meaning of an administrative regulation stands on a different footing from uncertainty as to the meaning of a statute. One cannot inquire of Congress what it meant; but the administrative agency is always available to clarify its meaning. Judicial acceptance of the Administrator's construction will be no imposition upon defendant-appellee for the further reason that if in fact his conduct is adjudged free from wilfulness and it is found that he did take practicable precautions to avoid the violations, then under Section 205(e)

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[11]The same is true of the maxim "expressio unius exclusio alterius". If it would otherwise have application here, that application is refuted by the indicated unreasonable and illogical consequences that would flow therefrom. See, *Ford v. United States,* 273 U. S. 593, 612, 47 S. Ct. 531; *United States v. Barnes,* 222 U. S. 513, 32 S. Ct. 117, 118; *Phipps v. Commissioner of Internal Revenue,* 91 F. (2d) 627 (C.C.A. 10th), cert. den. 302 U. S. 742, 58 S. Ct. 144; *Securities & Exchange Commission v. Joiner Leasing Corp.,* 320 U. S. 344, 64 S. Ct. 120.

only the single overcharge can be recovered by the Administrator.

Finally, the Court's attention is called to the fact that Judge McCulloch reached his decision to dismiss the suit because of the Administrator's alleged failure to sustain the "burden of proof" on his interpretation of the regulation. It is submitted that this reverses the established, strong presumption in favor of an administrative agency's construction of its own regulation. As is true of the administrative construction of a statute (*Billings v. Truesdell,* 321 U.S. 542, 552-53, 64 S. Ct. 737; *Skidmore v. Swift,* ..... U.S. ..... 65 S. Ct. 161) the agency's construction of its own regulation is entitled to persuasive weight unless clearly erroneous (*Bowles v. Seminole Rock & Sand Co.,* ..... U.S. ....., 65 S. Ct. 1215; *Consolidated Water Power & Paper Co. v. Bowles,* 146 F. (2d) 492 (Em. App.); *Bowles v. NuWay Laundry,* 144 F. (2d) 741 (C.C.A. 10th)).

II. THE MAXIMUM PRICES APPROVED UNDER SECTION 12 FOR THIS LUMBER ARE PROPERLY CONSTRUED AS APPLICABLE TO THE APPELLEE-WHOLESALER'S SALES THEREOF MADE PRIOR TO THE APPROVAL.

After providing that for special grades, specifications, etc., an application for a price must be made, Section 12 goes on to state in paragraph (b):

> "As soon as the request has been filed, quotations and deliveries may be made at the requested price, but the final payment may not be made until the price has been approved. Action on the request may be by letter or telegram."

It is thus quite clear that the price ultimately established by the Administrator is *intended* to apply to deliveries already consummated.

Nor can there be much question as to the *validity* of such a "retrospective" price. The Administrator could have prohibited, in order to prevent evasion of the maximum prices established, any sales of qualities or sizes not specifically priced. He could, even more clearly, have prohibited such sales from being made *until approval* of the application had been granted. In fact, he did less than either of these things. He permitted such sales to be made, subject to the requirement that the price ultimately approved should be applicable. Such a more generous, and practical plan for dealing with the difficult, special-pricing problem can hardly be regarded as invalid. Nor can it be said that the price should date back only in the situation where the request for approval has been made at the time of the sale; that it is inapplicable to transactions prior to a *belated* request for approval. This would indeed put a premium on profiteering and black marketeering. It would enable a seller who in violation of the Regulation has failed to apply for a price, to cloak his subsequent sales with immunity from price-control. His own violation, in failing to apply for a price, will forever prevent a price being established that can apply back to the date of his sales; and the violation will result in giving him preferred status over his law-abiding competitors. We cannot believe that appellee will seriously urge here this remarkable contention, though there is some suggestion of it in the record. It has long been recognized

that "he who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned" (*R. H. Stearns Co. v. United States,* 291 U.S. 54, 61, 54 S. Ct. 325, 328). "No court will lend its aid to a party who founds his claim for redress upon an illegal act" (*The Florida,* 101 U.S. 37, 25 L. Ed. 898). The present case is thus a far stronger one than others in which administrative action having retrospective effect has been judicially sanctioned (*Helvering v. Reynolds,* 313 U.S. 428, 433, 61 S. Ct. 971; *Manhattan General Equipment Co. v. Commissioner,* 297 U.S. 129, 135, 56 S. Ct. 397; *Atlantic Coast Line R. Co. v. Florida,* 295 U.S. 301, 55 S. Ct. 713; *Addison v. Holly Hill Fruit Products,* 322 U.S. 607, 622, 64 S. Ct. 1215).

Nor can it be said that the prices established here were invalid as to the appellee-wholesaler because they were established pursuant to the application of the *mill* involved in these transactions. Under Section 3 of the regulation, the maximum prices established pursuant to the regulation (whether by its specific dollar-and-cents prices or by its special-authorization provisions in Section 12) apply to "all shipments originating at a mill, no matter who the seller is, and no matter whether he usually is known as a mill, wholesaler, retailer or anything else". That the application of this rule to the present case is not invalidly burdensome upon the appellee-wholesaler is readily seen from the fact that after the latter's failure to file the required application, the Administrator could, *on his own initiative,* have established the prices in question, pursuant to his continuing

quasi-legislative and rule-making power under the Act. The fact that he gave an opportunity to the mill involved in the transaction to file an application is no cause for complaint by the wholesaler.

But it is in fact unnecessary to discuss here whether the prices ultimately established are invalid because of "retroactivity" or because they were established pursuant to the mill's application. All such questions of invalidity are reserved, under Section 204(d) of the Act, for the Emergency Court of Appeals only. It is clear that Section 204(d) applies not only to prices or rents established directly in the broad regulation itself, but also those which, pursuant to authority of the broad regulation, are established separately for individual sellers or landlords.[12] Moreover, in *Bowles v. Schutz, d/b/a Distillers Distributing Co.,* N.D. Cal. S.D., unreported, October 6, 1944, No. 22861-G, which, like the present suit, was a treble damage proceeding under Section 205(e), Judge Goodman specifically concluded that Section 204(d) applied to the conten-

[12] *Bowles v. Willingham,* 321 U. S. 503, 509-510, 521, 64 S. Ct. 641. The Emergency Court has considered as within its jurisdiction an attack on an individual, retroactive reduction of rent (*Womack v. Bowles,* 146 F. (2d) 497 (Em.App.)); or an attack on the non-retroactivity of an individual price adjustment (*Goodman v. Bowles,* 138 F. (2d) 917 (Em.App.)); *Buckley Dement & Co. v. Bowles,* 143 F. (2d) 877 (Em.App.)). So too the Circuit Court of Appeals for the Fifth Circuit has held that an attack on the non-retroactivity of an individual order establishing a maximum rent raises a question for the Emergency Court (*Bowles v. Lake Lucerne Plaza,* ..... F. (2d) ..... (C.C.A. 5th). Similarly, an objection to a meat regulation, that the forbidden overpayments for cattle by slaughterers could not be ascertained until after the cattle had been slaughtered and their yield determined, was held to raise a question for the Emergency Court (*Bowles v. Izakowitz and Glicksman* (S.D.N.Y.), C.C.H. Price Control Cases, Par. 52,276).

tion that a liquor price authorization under Section 1499.3(c) of the General Maximum Price Regulation[13] (analogous to Sec. 12 of the RMPR 26) was invalid for "retroactivity", and awarded treble damages. In *Bowles v. Primrose Petroleum Co.* (D. Ct. N.D. Tex. C.C.H. Price Control cases Par. 52,207), Judge Atwell gave judgment to the Administrator for single damages in a Section 205(e) suit wherein the maximum price was established specially, under a provision of the petroleum price regulation[14] analogous to Section

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[13]Section 1499.3(c) (7 F.R. 3153):

"If a seller at wholesale or retail is unable to determine a maximum price for a commodity under paragraph (a) of this section, he shall file an application with the District Office of the Office of Price Administration for each District in which he operates as a separate seller (unless otherwise directed by a uniform pricing order) for approval of a proposed maximum price for the commodity * * *

"A commodity for which a maximum price is proposed under this paragraph (c) may not be sold * * * until that price has been approved by the Office of Price Administration, but the proposed price shall be deemed to be approved 20 days after mailing the application (or all additional information which may have been requested) unless, within that time, the Office of Price Administration notifies the seller that his proposed price has been disapproved."

[14]This was under Section 1340.159(b)(7) of Price Schedule No. 88, which at the time of violation read (7 F.R. 718, 7242):

"In the event that a seller is unable to determine a maximum price at a given shipping or delivery point for the sale of any petroleum product under paragraph (b) or (c) of this § 13440.159 * * * then the seller shall set a tentative maximum price for such product * * * The seller shall within 15 days after setting a tentative maximum price, file with the Office of Price Administration a written request for approval of such tentative maximum price * * * Such tentative price shall be the seller's maximum price at the particular shipping or delivery point for the particular product unless it is disapproved in writing by the Office of Price Administration within thirty days from the date it is filed as above provided or a substitute price is set by the Office of Price Administration. If a substitute price is set then such price shall be the maximum price."